



Ninety-Ninth Legislature - First Session - 2005
Introducer's Statement of Intent
LB 170

Chairperson: Mick Mines
Committee: Banking, Commerce and Insurance
Date of Hearing: February 1, 2005

The following constitutes the reasons for this bill and the purposes which are sought to be accomplished thereby:

LB 170 would amend the Nebraska Uniform Trust Code (NUTC), Neb. Rev. Stat. Sections 30-3801 to 30-38,110 (Supp. 2004) [UTC Sections 101 to 1106] to reflect amendments to the Uniform Trust Code (2000) adopted by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in August 2004. Nebraska enacted the Uniform Trust Code in 2003 which became operative on January 1, 2005. The UTC is becoming the first truly national codification of the law of trusts. To date, it has been enacted in ten states, including the District of Columbia, and additional introductions are expected in 2005 and the next few years. Clarifying and "clean-up" amendments recommended by NCCUSL were contained in Sections 24 to 29 of LB 999 in 2004 [which incorporated provisions from LB 885 (2004)]. It can be expected that as this national trust code further becomes the national standard of trust law, there will periodically be further technical refinement in its provisions. It is important that LB 170 be enacted with an emergency clause early in the 2005 session in order to minimize the gap in time between the entire NUTC's operative date, January 1, 2005, and the effective date of this bill.

Section 1 would amend the definitions in Section 30-3803 (UTC 103) in three respects:

1. Section 1 would insert a new subdivision (2) in Section 30-3803 to provide a definition of "ascertainable standard" which would link to the definition of "ascertainable standard" in the Internal Revenue Code. Currently, the only provisions regarding an ascertainable standard in the NUTC are contained in subdivision (b) (1) of Section 30-3879 (UTC 814). The new definition would apply to provisions in two places – the definition of "power of withdrawal" in renumbered subdivision (11) of Section 30-3803 as well as the discretion of a trustee or cotrustee who is also a beneficiary in subdivision (b) (1) of Section 30-3879 (UTC 814) (Section 11 of the bill).
2. Section 1 would amend the definition of "power of withdrawal" in renumbered subdivision (11) of Section 30-3803. A "power of withdrawal" is considered a general power of appointment. These amendments would clarify that a power exercisable by a trustee which is limited by an "ascertainable standard" does not constitute a "power of withdrawal." This is to prevent an unintended inference relating to a discretionary power

of a trustee to make a distribution for the trustee's own benefit which is limited by an ascertainable standard. Section 7 of the bill, which would amend Section 30-3849 (UTC 504), relates to this issue and would add a clarifying new subsection (e) to that section (see description of Section 7 of this bill).

3. Section 1 would amend the definition of "qualified beneficiary" in renumbered subdivision (13) of Section 30-3803 to clarify that subdivision (13)(B) relates to a continuation of the trust, and subdivision (13)(C) relates to a termination of the trust.

Section 2 would amend Section 30-3805 (UTC 105) to make two important changes in the few mandatory provisions of the NUTC. The UTC is primarily a "default" Code in that the provisions of the trust instrument control its legal consequences and the statutory rules merely supplement the provisions of the trust. Section 2 would amend the mandatory requirements in subdivisions (b)(8) and (9) of Section 30-3805. These subdivisions relate to the extent that the trust instrument can waive notices and information the trustee is obligated to send or supply to the trust beneficiaries. A majority of the first states to enact the UTC significantly modified these provisions and NCCUSL has now "bracketed" them in the official text which means that "states may elect to enact these provisions without change, delete these provisions, or enact them with modifications." Following substantial further analysis by the legislative interim study group involved in the original Nebraska enactment, and others:

1. Section 2 would repeal subdivision (b) (8) of Section 30-3805 in its entirety. This subdivision currently makes mandatory the notices required under subdivisions (b) (2) and (3) of Section 30-3878 to be given to qualified beneficiaries within 60 days of establishment of an irrevocable trust. It is felt by practitioners that this instead should be left primarily to settlors and their trust planners.

2. Section 2 would amend subdivision (b) (9) of Section 30-3805 to clarify that it relates (1) to "qualified beneficiaries" only and (2) to the duty to keep qualified beneficiaries "reasonably informed." Other than this mandatory requirement, the provisions of the trust as to notice control and the UTC operates in default of language in the trust instrument.

Section 3 would amend Section 30-3810 (UTC 110) to clarify when a charitable trust is considered a "qualified beneficiary" under the UTC. A designated charitable organization is considered a "qualified beneficiary" if it has rights similar to those of a "qualified beneficiary" in a noncharitable trust. NCCUSL has recommended this clarifying change in the official UTC text.

Section 4 would amend Section 30-3822 (UTC 301) with addition of a new subsection (d) which would eliminate the power of a settlor of a trust to represent and bind a beneficiary with respect to termination or modification of a trust. This is a NCCUSL change, adopted on the recommendation of the American College of Trust and Estate Counsel. Its purpose is to eliminate the possibility of unintended and unwanted federal tax consequences to the settlor.

Section 5 would amend subsection (b) of Section 30-3836 (UTC 410) to repeal the power

of a settlor to initiate and maintain proceedings to modify or terminate a trust. This is a NCCUSL “bracketed” change intended to eliminate the possibility of unintended and unwanted federal tax consequences to the settlor.

Section 6 would amend subsection (a) of Section 30-3837 (UTC 411) to repeal the authority of the settlor and all trust beneficiaries to modify or terminate a material provision in a trust without court approval and to require that even if the settlor and all trust beneficiaries consent, the court must approve the modification or termination of a material provision of the trust. This is a NCCUSL change, adopted on the recommendation of the American College of Trust and Estate Counsel, intended to eliminate the possibility of unintended and unwanted federal tax consequences to the settlor.

Section 7 would amend Section 30-3849 (UTC 504) by adding a new subsection (e) utilizing the new defined term “ascertainable standard.” The new subsection (e) would clarify that creditors of a trustee or co-trustee who is also a beneficiary (or is included within a class of potential beneficiaries), such as a surviving spouse, cannot reach the beneficial interest if the trustee’s discretion to make distributions is limited by an “ascertainable standard.” The current “common law” rules which might otherwise be applicable are not clear in this respect and, for that reason, NCCUSL has recommended this change.

Section 8 would amend subsection (a) of Section 30-3855 (UTC 603) to reaffirm that the duties of a trustee of a revocable trust are owed exclusively to the settlor. These amendments would repeal the language now bracketed in the official NCCUSL text “and the settlor has capacity to revoke the trust,” so that the rights of the beneficiaries to notices and other trust information do not automatically come into existence. The rights of beneficiaries of a revocable trust whose settlor becomes incompetent would be comparable to the rights of devisees under a will of a testator who becomes incompetent. A settlor’s power to revoke the trust would not be terminated by the settlor’s incapacity, although incapacity may affect the settlor’s legal ability to exercise the power. Nebraska attempted to deal with issues of a settlor’s subsequent incapacity in LB 999 of 2004 by enacting nonuniform provisions which became the last two sentences in subsection (a). These amendments would repeal those two nonuniform sentences to conform subsection (a) to the alternative version of the official NCCUSL text.

Section 9 would amend subsection (e) of Section 30-3867 (UTC 802 (f)) to clarify the nature of the internal reference to the Nebraska Uniform Prudent Investor Act.

Section 10 would amend Section 30-3878 (UTC 813). This section reflects two changes which would effectively be made in it by this bill.

1. The repeal subdivision (b) (8) of Section 30-3805 (UTC 105) in Section 2 of this bill (mandatory provisions of the UTC) would make the notices specified in subdivisions (b)(2) and (3) of Section 30-3878 “default” requirements rather than “mandatory” requirements of the UTC. The operative date for those notice requirements would be deferred to January 1, 2006 by this section’s amendments to subsection (f) of Section 30-3878, in order to allow additional time for settlors and estate planners to write trust instruments with the revised statutes in mind.

2. The amendments to subdivision (b) (9) of Section 30-3805 in Section 2 of this bill (mandatory provisions of the UTC) would limit the applicability of subsection (a) of Section 30-3878 to “qualified beneficiaries.”

Section 11 would amend Section 30-3879 (UTC 814) to repeal language in subdivision (b) (1) which would be replaced by the new definition of “ascertainable standard” in new subdivision (2) of Section 30-3803 (UTC 103) (section 1 of this bill).

Section 12 would provide repealers.

Section 13 would provide the emergency clause. The emergency clause is an important aspect of this bill in order to minimize any gap between January 1, 2005, the operative date of the NUTC, and the time this bill would become effective. It is not intended that there will be adverse legal consequences arising from this short time gap.

Principal Introducer:

Senator David Landis